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IN THE

# Supreme Court of the United States

October Term, 1944.

SELDON R. GLENN, Collector of Internal  
Revenue,

Petitioner,

*versus*

ELEANOR BEARD, Respondent.

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## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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REVENUE, - - - - - *Petitioner,*

v.

ELEANOR BEARD, - - - - - *Respondent.*

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## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable the Chief Justice and Associate  
Justices of the Supreme Court of the United States:*

The respondent respectfully submits that the prayer of the petitioner for the issuance of a writ of certiorari should not be granted.

### STATEMENT.

The respondent, Eleanor Beard, was engaged, and had been engaged since 1921, in the business of producing comforters, quilts and similar articles which were made by hand. These articles were produced in Hardin and Breckinridge counties, Kentucky. She

conducted a studio at Hardinsburg in Breckinridge County, Kentucky. The persons claimed to be her employees in this proceeding and who did the hand work on contract with the respondent lived in the above counties, on farms in the main, and were the wives and daughters of farmers. They are referred to in the Findings of Fact as "homeworkers." The reason for this is because they did the work in their own homes (R. 103-106). There were approximately a little over one thousand women doing such homework within the above community, of which approximately three hundred did this work for respondent. Several concerns were producing in competition with the respondent similar articles, viz., Kentucky Cottage Industries, American Needlecrafts, Inc., M. Gilanti, Mrs. Lottie Wilson and Regina. The homework was done for all of these firms and individuals more or less in the same way (R. 106). The homeworker had the right to, and generally did, accept work from the respondent and a competing studio at the same time, and have in her home work from two or more of the above firms (R. 107).

These women, referred to as homeworkers, had their usual farm duties to perform, such as keeping house, cooking the meals, raising the children, canning, hog killing, and assisting sick neighbors. They did not work steadily throughout the year and would not accept the work at certain periods when their farm duties did not leave time to do such work. They did the work at odd times when they were not otherwise

employed with their farm duties and at night after the evening meal (R. 106).

"There was no requirement on the part of the plaintiff that a homeworker should work exclusively for her, either over any stated period of time or during any period of time when she was working for the plaintiff. There was no requirement that homeworker take and complete any certain amount of work, the amount being taken by the homeworker being determined by what she was willing to take and wanted to take and could be returned in a reasonable time. It was not necessary for a homeworker to call in person at the studio to get the work, and one homeworker would frequently go to the studio and get bundles for both herself and other homeworkers living in the same general locality to whom she would distribute the bundles after returning to her own home. The homeworker who received the bundle at the studio signed the contract in her own name and was responsible for the return of the work according to the agreement with the studio. In many instances the studio did not know, and never advised, as to which homeworkers actually received the different bundles and performed the work. In some instances the work was sent to homeworkers by mail." (R. 107.)

Respondent did not exercise any control or supervision over the homeworkers or over the work while it was being done. It was left entirely to the judgment and wishes of each homeworker as to the number of days or hours in any week or month she would devote

to the work. She could start work at any time of the day or stop work at any time she desired. She could work for a short period of time at different intervals during the day if she wished, or she could refrain from working at all on any particular day she preferred not to work. No employee of the respondent visited the homeworker to inspect the progress or quality of the work or to supervise the doing of the work while it was being done. The only right the respondent exercised was the right of inspection of the results, and if found to meet the design or specifications the homeworker was paid the contract price (R. 108).

The method of contracting indulged in by respondent was substantially as follows:

A design for an article was determined upon by the respondent, which was stamped upon the material to be used, and specifications dealing with the work to be performed were decided upon. The article was then taken to the receiving room, where material and thread were wrapped with it. The specifications or instructions were placed upon a work-ticket attached to the bundle. The bundle was then delivered to a homeworker who wished to do the work, and who took the bundle from the studio to her home. The respondent furnished no tools, or even needles, to the homeworker, who was required to furnish her own frame, needle, thimble and any home-made stand for supporting or suspending the article. At the time of the delivery of the bundle to the homeworker, a contract was executed, the form of which is set out in the Record (R. 103-104). A signed copy of the contract was given to the home-

worker and one was retained by respondent. The price to be paid for the completed article was originally fixed by the homeworker, and if in the opinion of the homeworker it developed that it was not enough, the homeworker discussed the matter with the respondent and a price agreed upon satisfactory to both parties. Thereafter prices were fixed by comparison with the prices previously paid for similar work, with more difficult designs getting higher prices and with adjustments being made with the homeworker when the work proved more difficult than expected. If the price paid by the respondent for the work on any given article was not satisfactory to the homeworker, she did not take that particular work, but took such other work as was agreeable to her. Each homeworker controlled the time in which the work was to be completed by an estimate made at the time the work was received. When the work on the particular article was completed by the homeworker, it was returned by her to the studio, where it was inspected, and if it complied with the specifications, the contract price was paid. If the work was not in accordance with the specifications, it was rejected. The homeworker was usually offered an opportunity to do the work over, but as a practice did not do it. For rejected work she received no compensation. The article thus produced is highly artistic and sold exclusively to the luxury trade (R. 105-106).

The District Court concluded as a matter of law that the homeworkers were independent contractors, and, therefore, exempt from the provisions of the Act in question (R. 111).

**THE QUESTION PRESENTED.**

The only question that was ever presented, either in the District Court or Circuit Court of Appeals, was whether these individuals were employees within the meaning of the provisions of the Social Security Act (Title IX, C. 531, 49 Stat. 620, Sections 901-907).

**REASONS ASSIGNED AS SUPPORTING THE PETITION.**

The basis for the writ, generally speaking, may be covered by the following propositions:

- (a) That the decision involves an important federal question;
- (b) That much confusion has arisen in the enforcement of the Act in question by the Commissioner, resulting in many thousands of cases involving many thousands of individuals, which requires a decision in order to clarify the situation existing within the office of the Commissioner.

**ARGUMENT.**

No doubt, from the expressions used in the petition as well as the data furnished, there is much confusion in the office of the collectors throughout the United States as to whether, in a given situation, an individual is an employee or independent contractor. At the outset, and after the Acts in question were adopted by the Congress, the Commissioner adopted certain regu-

lations interpreting the Acts and as a guide for the enforcement thereof. Among them is Treasury Regulation 90, found quoted at page 24 of the appendix to the petition. Paragraph (c) of that regulation, among other things, provides:

“However, the relationship between the individuals who perform such services and the person for whom such services are rendered must, as to those services, *be the legal relationship of employer and employee.*” (Italics ours.)

And again:

“The words, ‘employ,’ ‘employer’ and ‘employee,’ as used in this article, are to be taken in their ordinary meaning.”

And further:

“In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.”

We believe that this regulation as a whole fairly interprets the acts in question, and certainly, under the regulations, before an individual can be brought within the terms of the Act for social security purposes, “the legal relationship of employer and employee” must be established.

With this regulation interpreting the acts in accordance with their terms, and fairly so, the action of the

Commissioner, as in this case, in attempting to get away from his own interpretation of the Act in the first instance has been the primary cause, in our opinion, for the confusion that exists and as pointed out in the petition.

Uniformly, when the question of the meaning of this Act has been involved in social security cases, the district courts and the various Circuit Courts of Appeals, where the cases have been decided, have interpreted the Act exactly as the Commissioner did when he promulgated Regulation 90. See *Indian Refining Company v. Dallman*, 31 Fed. Supp. 455; *Texas Company v. Higgins*, 118 F. (2d) 636; *Walling v. Sanders*, 136 F. (2d) 78. Likewise, the Court of Appeals of Kentucky, as well as the courts of last resort of other States, have construed similar acts of the States the same way. See *Barnes v. Indian Refining Co.*, 280 Ky. 811; *Texas Company v. Bryant*, (Tenn.) 152 S. W. (2d) 627. In the present case the District Court and the Sixth Circuit Court of Appeals did likewise, so that the confusion and congested condition of the offices of the various collectors has arisen due to the position taken by the Commissioner and various collectors, which runs counter to the very regulation adopted in the first instance. In other words, the Commissioner has presented the situation that exists and not the taxpayer.

We have no quarrel with the principles announced by this Court in the cases of *United States v. American Trucking Ass'ns*, 310 U. S. 534; *South Chicago Company v. Bassett*, 309 U. S. 251, 259; *Drivers' Union v.*

*Lake Valley Co.*, 311 U. S. 91; *National Labor Relations Board v. Hearst Publications*, decided April 24, 1944; *Tennessee Coal Company v. Muscoda Local*, 321 U. S. 590, 597. Nor have we any quarrel with the language quoted in the petition from the last above-mentioned case, and we agree with the principle that the statute "must be read in the light of the mischief to be corrected and the end to be attained." In other words, the question in any given case as to whether a person is an employee or independent contractor turns upon the facts in the particular case, and the language of the particular Act sought to be applied.

The language in the Tennessee Coal Company case, *supra*,

"the word 'employed' \* \* \* must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. \* \* \* Such statutes \* \* \* should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them,"

involves the principles that we believe the District Court followed in the decision of this case, which was affirmed by the Circuit Court of Appeals.

Turning back to the facts, it will be observed that these homeworkers were protected from every standpoint in the making of these contracts, in so far as control and pay were concerned. They fixed the price for the given article and fixed the time within which it should be performed. They were not required to work

for anyone exclusively, and the very business itself furnished the competition as among the various industries that guaranteed liberty of action on the part of the homeworkers. No fact or circumstance contained in the record is pointed out in the petition or argued here to be within the principles quoted above, except the fact that if a homeworker was incapable of performing the contract she was not given more work. If she was incompetent and failed in the performance of her contract, she was not only not paid for the work that she had so improperly performed, but was not given additional work. We have searched the authorities to find a case supporting the proposition that these facts constituted any evidence that the person involved was an employee. The contrary is true. To adopt the language quoted *supra* from Regulation 90:

“If an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.”

All that the rejection of the work and the refusal to give other work by reason of incompetence proves is the right to control the result, and in the promulgation of Regulation 90 the entire tax collecting department of the United States merely followed the rule that respondent sought to have enforced and that was enforced by the courts here.

While this Court, in so far as the writers of this brief are advised, has never construed the Social Se-

curity Act as to the question here involved, it has construed the Railroad Employees' Liability Act involving similar language. We refer to Mr. Justice Hughes' opinion in *Robinson v. Baltimore & Ohio Railroad Company*, 237 U. S. 84, 59 L. Ed. 849, wherein Mr. Justice Hughes said:

"We are of the opinion that congress used the words 'employee' and 'employed' in the statute in their natural sense and intended to describe the conventional relation of employer and employee."

See, also, *Wells-Fargo Co. v. Taylor*, 254 U. S. 175, 65 L. Ed. 205; *Chicago, Rock Island & Pacific R. R. Co. v. Bond*, 240 U. S. 449, 60 L. Ed. 735.

#### **CONCLUSION.**

In conclusion, we desire to call the Court's attention to some very practical questions that are involved in this proceeding. It is to be noticed in the Findings of Fact that the respondent never knows who performs the work, and there is no way for her to know who actually performs the work on these bundles. As the Court points out, the work is done by the wives and daughters of farmers who come from their homes in the country to this village and procure bundles. All of the ladies in the household work at odd times on these bundles. Indeed, the husbands and fathers many times call for the bundles, and the only record that the respondent could have as to who takes out the bundles are the ones who call and sign the contracts. In

other words, Mrs. Smith may sign six separate contracts for six separate bundles, all of them in her own name and return those bundles and collect the contract price. Mrs. Smith's daughters and her neighbors may, and do, frequently perform this work. Due to travel and dirt roads, an individual in a community at a distance from Hardinsburg would drive in to the studio, collect bundles for all of the neighbors and in turn parcel them out as she has a right to do under the contract, then collect up the bundles, deliver them to the studio and collect the contract price. In many instances the husbands of these individuals will collect the bundles for a community, return them, collect the contract price and perform no part of the work, he distributing the money to the various homeworkers. There is no way for the respondent to know who actually performs the work, and the record fails to disclose that fact, but the records of the respondent disclose the names of the persons to whom she paid the contract price, and the funds collected from the respondent and involved here could not be credited to any one other than the person who received the money and not to the person who did the work.

The very funds involved in this proceeding were collected by the petitioner from the respondent under the conditions set forth above, and if they are credited for social security purposes to the individuals who received the money, as they must be or the funds retained, then the actual homeworker obtains no benefit from social security, even though she performs the work and ultimately get the money. We know that the con-

fusion in the office of the Commissioner with reference to these homeworkers does exist, because this respondent could not, on request, advise the Commissioner actually who earned the money.

While there may be 77,000 homeworkers in the United States who perform work for industries as set forth in the notes to the petition, the individuals involved in this particular business are the number set forth in the Findings of Fact, or approximately 300 women. None of these statistics quoted so elaborately in the petition show that the particular character of work done here is performed anywhere outside of the above locality. The respondent was the originator of this work, and it is interesting to note that she started out with three women who were capable of doing it (R. 22). From 1921 to the present time, through experience and education, the number has grown to approximately 1,000, as we have pointed out above, and likewise competition has arisen to the point where there are four or five firms and individuals competing in the field, which makes it easy for the homeworker to procure a fair return for her work and be at complete liberty as to whether she will or will not do work for any one of the other of these firms and corporations. The fact that they all contract the same way is evidence that the way the work is done is the only way it can be done. In other words, this proceeding could not settle any great public question involving any more than those individuals living on farms in Breckinridge and adjoining counties in Kentucky.

Therefore, for all practical intents and purposes, this case involves a particular locality in the United States and no more than 1,000 individuals in that locality. There is no way for the petitioner or any authority of the Government to properly or correctly allocate the funds to the individuals who actually do the work, and due to no fault of the respondent that either actually exists or that is pointed out in the petition.

For the foregoing reasons, we respectfully submit that the case was correctly decided below and that there is no basis on which the petition can be sustained. Accordingly, it should be denied.

Respectfully submitted,

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